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In the Supreme Court of the United States,

OCTOBER TERM, 1906.

Numbers 278, 279.

Supreme Court,
FILED.
APR 12 1907
JAMES H. McKENN

MEYER S. BERNHEIMER and LORIN S. BERNHEIMER, Surviving Executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

MAX DREY, CHARLES D. BERNHEIMER and MEYER A. BERNHEIMER, Executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

In Error to the Circuit Court of the United States for the Southern District of New York.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

LAURENCE ARNOLD TANZER,
Of Counsel for Plaintiffs in Error.

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In the Supreme Court of the United States,

OCTOBER TERM, 1906.

MAYER S. BERNHEIMER and LORIN S. BERNHEIMER, surviving executors of the Last Will and Testament of Simon Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 278.

MAX DREY, CHARLES D. BERNHEIMER and MEYER A. BERNHEIMER, executors of the Last Will and Testament of Isaac Bernheimer, deceased,

Plaintiffs in Error,

vs.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,

Defendant in Error.

No. 279.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Reply Brief for Plaintiffs in Error.

The brief for defendant in error treats of the constitutional objections and the question of the receiver's right to maintain this action; and this reply will be confined to those points. The brief for the plaintiffs in error and the brief for the defendant in error will be cited as P. E. and D. E., respectively.

I.

The Impairment of the Obligation of the Contract.

There seems to be a radical difference in the views of the respective parties as to the nature and extent of the stockholders' double liability under the laws of Minnesota. The plaintiff's argument appears to be, that each stockholder has agreed to contribute to the corporate assets, in addition to his subscription, an amount equal to the amount of his stock, and that no change in the law affords him any ground for complaint which does not increase his liability beyond that amount. The defendants contend that the stockholder's agreement was not to contribute anything to the corporate assets, but to become liable directly to the creditors for such sum as a court of equity, after hearing all the creditors and all the stockholders, should fix as his proportionate share of the amount actually remaining due to creditors after the corporate assets have been exhausted; and that the obligation of his contract is impaired by any attempt to hold him liable for any different amount, or for an amount fixed in any other way.

The question then is, what was the stockholders' contract?

That the liability rests on contract is agreed by both sides (P. E., 29; D. E., 5).

Where are the terms of the contract to be found? First of all, in the constitutional provision creating the liability.

But the terms of that provision are indefinite. They are, that "Each stockholder * * * shall be liable to the amount of stock held or owned by him." This provides for just these two things: (1) there shall be a liability; (2) the limit of the liability shall be the amount of stock held or owned by the stockholder. Except for this limit of maximum amount, the liability is in no way limited or defined. The stockholders shall be liable to whom? For what obligations? Is the liability joint or several, absolute or proportionate? How is the amount of liability to be determined, and how enforced? In all these particulars, the liability requires to be defined; the general and indefinite language of the Constitution must be filled in.

The definition of the liability must be looked for in the decisions of the courts of Minnesota. The legislature never attempted to define it. The only statute on the subject is chapter 76 of the General Statutes (P. E., 6, 7). That does not in any way describe or define the liability, but only indicates in a general way the method to be followed for its enforcement. It provides that any creditor may file a complaint to charge the officers, directors or stockholders of any corporation "on account of any liability created by law" (Sec. 5905); that "the Court shall proceed thereon, as in other cases" (Sec. 5906), and "ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases" (Sec. 5907); that if, after exhausting the assets of the corporation and the subscriptions of stockholders, the debts remain unsatisfied, "the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases" (Sec. 5910).

This is no definition of any liability, but a mere skeleton of a method for enforcing all existing liabilities of stockholders, officers and directors. It is to the decisions of the courts of Minnesota, then, that we must look to ascertain the nature and extent of the double liability imposed by the Constitution of Minnesota. Those decisions have established the following propositions:

(1) The liability is one *to the creditors* of the corporation.

In Re People's Live Stock Insurance Co., 56 Minn., 180, 185: "But the constitutional or statutory liability is *directly to the creditors.* The corporation cannot enforce it. It is no part of its assets."

Minneapolis Baseball Co. v. *City Bank*, 66 Minn., 441, 446: "As to the liability of stockholders for the corporate debts, it is not, and never was, a corporate asset, for *it is due directly to creditors.*"

Hale v. *Allinson*, 188 U. S., 56, 67: "That was a contract in behalf of the creditor, with which the corporation had nothing to do."

(2) The liability exists for the payment of *debts.*

Willis v. *Mabon*, 48 Minn., 140, 148: "While no fixed form of words has been adopted to express the idea, yet provisions couched in more or less similar language have been frequently incorporated into constitutions and statutes, and have been uniformly understood and construed as providing for an individual liability of stockholders *for corporate debts* in addition to this risk of losing the amount of their stock. This is the meaning which has invariably attached to this provision of our Constitution."

McKusick v. *Seymour, Sabin & Co.*, 48 Minn., 158, 167: "That this section of the Constitution is self-executing, and creates a liability on the part of each stockholder *for corporate debts* in a sum equal to the amount of stock held or owned by him, has been determined in the case of *Willis* v. *St. Paul Sanitation Co.*, 48 Minn., 140."

Richardson v. *Merritt*, 74 Minn., 360, 362: "This superadded liability is not a corporate asset, and can only be enforced for the benefit of creditors, and then *only to the extent of paying the corporate debts remaining unpaid after the corporate assets have been exhausted.*"

(3) The liability extends only to the making up of any *deficiency* in payment of debts, *after the corporate assets are exhausted.*

See the last passage cited from *Richardson* v. *Merritt, supra.*

In re Martin's Estate, 56 Minn., 420, 422, 423: "This personal liability was evidently intended to provide for the contingency of a *deficiency of corporate assets,* which remain the primary fund for the payment of corporate debts."

(4) Each stockholder's liability is limited to his share of a *common fund* amounting to the sum *actually required to make up such deficiency.*

In re Martin's Estate, 56 Minn., 420, 422: "The object is to create *a common fund, limited in amount, for the benefit of all creditors.*"

National New Haven Bank v. *Northwestern Guaranty Loan Co.,* 61 Minn., 375, 392: "Such limited fund belongs to all of the creditors. Each and all of them are tenants in common in the fund, *to the extent necessary to satisfy the debts;* and the undivided part of the fund belonging to any one creditor can only be ascertained by determining all of the sums due all of the creditors."

It is therefore incorrect to say, as plaintiff's counsel say, or intimate, throughout their brief, that what the stockholder has agreed to pay is the amount of his stock, and therefore he cannot complain so long as he is not called upon to pay more than that. He has agreed to pay only his share of the amount actually required to make up the deficiency in corporate assets to pay corporate debts, not exceeding the amount of his stock. The amount of his stock is merely the outside limit of his possible liability; or, as the Statute of 1899 terms it, "the maximum of liability" (Section 7, P. E., 10).

The present contention of the plaintiff is well answered in *Converse* v. *Aetna Nat. Bk.,* 64 At., 341, 345, 346: "It is immaterial that the assessment was for much less than the full amount of the defendant's double liability. It was not bound to pay anything on account of that liability, except to satisfy corporate debts and the expenses incident to such action as the laws of Minnesota might provide for enforcing the obligations of shareholders to creditors whom the corporation left unpaid, and the costs of any subsequent suit properly brought for similar purposes against itself."

(5) It follows that any stockholder's share of the amount necessary to meet the deficiency in corporate debts can be ascertained, and his liability fixed, only by a proceeding in equity, to which all the creditors and all the stockholders are parties. The necessity for such a judicial determination arises from the very nature of the liability, and the courts of Minnesota have repeatedly so held. The plaintiff's contention that this is recognized as the exclusive remedy because of any provision of statute, is unsupported by reason or authority. The statute —Chapter 76— does not create or define or limit the liability, and does not provide that the remedy which it indicates shall be exclusive. If the legislature had attempted to limit and circumscribe the constitutional liability by providing that an inadequate remedy should be exclusive, it would have exceeded its powers, and the courts would have refused to be bound by its acts. On the contrary, the courts of Minnesota have uniformly decided that, by reason of the nature of the liability, no other remedy would be appropriate or adequate for fixing or enforcing the liability, and for that reason, and not because the statute says so, the remedy provided by chapter 76 is the exclusive remedy; and that if there were no statute on the subject, the courts would devise a remedy along the same lines for the enforcement of the constitutional liability.

In *Allen* v. *Walsh*, 25 Minn., 543, a decision made before the defendants' testators acquired their stock, the court construed a statute imposing on stockholders in banks a double liability in almost the exact language of the constitutional provision, viz.: "The stockholders in each bank shall be individually liable in an amount equal to double the amount of stock owned by them, for all the debts of such bank." The court sustained a demurrer to the complaint on the ground of a defect of parties defendant, in that all the stockholders had not been made parties.

The court said:

"The right determination of this question depends upon *the nature of the liability*, and *the policy of the law* in respect to its enforcement, as indicated by the statutes relating to the subject. * * * The language of this section, that 'the stockholders * * * shall be individually liable * * * for all the debts of the bank,' fairly imports a liability *in*

their individual or private capacities, of all the stockholders to all the creditors of such bank. Each and every creditor has the right to look to the individual responsibility of each and every stockholder as a security for his claim. The extent of this liability, however, is limited in the case of each stockholder, to double the amount of his stock, though within this limit it is an absolute and unconditional one, which attaches immediately upon the creation of the corporate debt, for which he is answerable to the creditor as upon an original indebtedness. Being created for the benefit of all the creditors, they all have an equal right to enforce their respective claims against each and every stockholder, and, if the bank is insolvent, with few or no assets, to participate equally in whatever proceeds may be realized out of the total liabilities, in proportion to the amount of such, their respective claims. As between the bank and its stockholders, the former stands in the position of the principal debtor, primarily responsible for the corporate debts, and liable to reimburse the latter for any payments made by them upon account of its obligations. As between the stockholders themselves, the equitable right of contribution exists, and arises in case either pays more than his just and proportionate share of the corporate indebtedness, and thereby to that extent relieves the others from responsibility on account of their individual obligations in respect thereto.

It is obvious that these respective rights and obligations can be adequately protected and enforced only through an exercise of the equity powers of the Court, and in an action wherein all the parties in interest are present and represented. * * *

As further indicating the legislative intention upon this subject, the General Statutes of 1866, which contain the statutory provisions upon banking and the individual liability of stockholders, also provide a special and *adequate remedy* for enforcing the liability, closing up the affairs of the bank in case of insolvency, and for the final adjustment of the rights of all the parties having any interest in the matter. Gen. St., C. 76. This chapter applies to all corporations. * * *

It is obvious, from an examination of these sections of Chapter 76, that the remedy they provide contemplates a single action, in which all persons having or claiming any interest in the subject of the action shall be joined or properly represented, and their respective rights, equities and liabilities finally settled and determined. *This accords with the general policy of the law* as it has existed in this State since 1853. * * *"

This construction of the language of the statute there in question obviously compelled the same construction of the same language in the Constitution; and the subsequent decisions of the Supreme Court of Minnesota have uniformly applied to the constitutional liability the principles enunciated in *Allen* v. *Walsh*.

Patterson v. *Stewart*, 41 Minn., 84, 90, 91: "The question as to the proper remedy to enforce the personal liability of stockholders or directors or officers for corporate debts depends so much upon the terms of particular statutes, or the remedial systems of different states, that not much aid can be obtained from the decisions of other courts. But we think it will be found generally true that, unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend *upon the character of the liability*. If its object is to create a common fund, limited in amount, for the benefit of all creditors, or all of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested,—*the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to.* Hornor *v.* Henning, 93 U. S., 228, is an example of this kind, and *these considerations were given much weight* in *Allen* v. *Walsh* (25 Minn., 543) and *Johnson* v. *Fischer* (30 Minn., 173), *in determining that the exclusive remedy was under chapter 76.*"

In re Martin's Estate, 56 Minn., 420, 422, 423: "This personal liability was evidently intended to provide for the contingency of a deficiency of corporate assets, which remain the primary fund for the payment of corporate debts. *Hence, it is evident no action or proceeding can furnish a complete remedy, or protect the rights of all persons interested, except*

one which brings in all interested parties,—the corporation, all the stockholders, and all the creditors. And *for these reasons* the courts generally hold, and in the absence of any statutory provision, that to enforce such a liability, created for such a purpose, the only remedy is by an action or proceeding to which all those interested are made parties, so that the rights and liabilities of all may be adjusted."

Hanson v. *Davison*, 73 Minn., 454, 461: "The remedy for enforcing the liability must, in the first instance, *from the nature of the liability*, be an equitable action. G. S., 1878, c. 76 (G. S., 1894, c. 76) indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. This statute prescribes the exclusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders. *Such an action, though provided by statute, is essentially an equitable proceeding;* and the rules of equity are to be followed, unless inconsistent with the statute. *If chapter 76 were repealed, equity would find an adequate remedy for the enforcement of the liability.*"

These decisions express the general rule, which has been applied by this Court and by other courts to similar cases (see cases cited, P. E., 40, 41).

Pollard v. *Bailey*, 20 Wall., 520, 525: "It is certain that no stockholder is liable for more than *his proportion* of the debts. This proportion can only be ascertained upon an account of the debts and stock and a *pro rata* distribution of the indebtedness among the several stockholders. The proper action, therefore, to enforce the liability is one in which such an account can be stated and distribution made. Such an action calls specially for the exercise of the powers of a court of equity, *which can bring before it all the necessary parties and adjust all their rights.* Every stockholder, when called upon to perform his obligations, has the right to require that the extent thereof shall then be determined once for all, as well that which he is under to his associate stockholders as that to the creditors. Otherwise he might be made to respond to the creditors under one rule and obtain his relief from the other stockholders under another. The provision, therefore,

for a proportionate liability *is equivalent to a provision for an appropriate form of equitable action to enforce it.*"

In *Terry* v. *Little*, 101 U. S., 216, the statute imposed a liability in substantially the same language as that used in the Constitution of Minnesota, and this Court took the same view of the nature of the liability and of the method of its enforcement as that taken by the Minnesota courts, saying, at page 217: "The remedy must always be such as is appropriate to the liability to be enforced."

The foregoing decisions declare the nature and extent of the liability, and the method for fixing its amount and for enforcing it. A substantial change in the contract in any of these respects impairs its obligation. As was said in *Green* v. *Biddle*, 8 Wheat., 1, at page 84:

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance, which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

In determining whether the obligation of the contract has been impaired, the question is not whether or not the new law is wiser or more beneficial than the old—a question upon which the parties differ. That is a proper consideration in legislating for the future; but with regard to existing contracts, the only question is, whether any material change is made in the contract.

Webster v. *Bowers*, 104 Fed., 627, 628: "The fact that the remedy provided by the later statute is, on general principles, more in harmony with the justice of a situation like the one in question, does not justify the impairment of the plaintiff's contract with the stockholder."

Myers v. *Knickerbocker Trust Co.*, 139 Fed., 111, 117: "With the policy of this later law, we are not here concerned. It may well be, that it is wiser and more equitable to make this stockholder's liability an asset of the corporation, and

either to allow a receiver to collect from all stockholders, and account pro rata to all creditors, or to accomplish the same result by a creditors' bill, in which all creditors may be parties and all stockholders defendants. But the law of the contract was not of this character at the time the liability of the defendant to the plaintiff accrued. The only question before us is, whether the law of 1904 works an impairment of the contract existing between plaintiff and defendant at the date of its passage."

The argument of plaintiff's counsel that the liability is statutory as well as contractual does not change the question. Obviously, the legislature of Minnesota could not impose any new or different duties on existing stockholders without their consent, any more than it could change their existing contract.

To take up the argument with regard to the particular changes which the new statute made in the contract:

(1) The addition of the expenses of the receivership. (P. E., 31-33.)

The authorities cited in support of the proposition, that stockholders were liable for such expenses before 1899 (D. E., 60-62), do not, it is submitted, support this view.

Harper v. *Carroll*, 66 Minn., 487, was an action to enforce, not the double liability created by the Constitution, but the liability of stockholders in banks imposed by section 2501 of the General Laws of 1894. The Court included the expenses of the receiver on the express ground that the statute contemplated the appointment of a receiver to enforce the liability. The liability created by the constitution is one which no receiver could have enforced before 1899, because it was not assets of the corporation.

In *Frost* v. *St. Paul Bond & Investment Co.*, 57 Minn., 325, the Court allowed the receiver to pay his expenses out of proceeds of stock subscriptions and other corporate assets,—not out of the double liability.

First Nat. Bank v. *Winona Plow Co.*, 58 Minn., 167, decided no question concerning the expenses of the receivership.

It stands to reason that if this liability could not be enforced by a receiver, and if the stockholders did not agree to respond to a receiver, they did not agree to pay the expenses of a receiver. The allowance of these expenses is sought to

be justified as an incident of the appointment of a receiver to collect the liability. But if the stockholders did not agree to such appointment, manifestly they have not submitted to its incidents.

The argument that a trust fund must bear its own expenses is an argument in favor of the defendants. The expenses in such a case are borne by the beneficiaries of the fund; they diminish the fund, and do not add to it. So, in *Helm* v. *Smith-Fee Co.*, 79 Minn., 297, cited by plaintiff's counsel (D. E., 59), one creditor suing on behalf of all was allowed a counsel fee out of the fund, thus throwing upon all the creditors the burden of the expense of the proceedings taken on their behalf. No one appears to have thought of adding this expense to the stockholders' assessment.

The passage cited from *Richmond* v. *Irons*, 121 U. S., 27, 65 (D. E., 61), tends to give an erroneous impression as to what was there decided. The Court there draws a distinction between the case of an assessment by a receiver, or, in the case of National banks, by the Comptroller of the Currency, in which case his expenses are recoverable; and the case of a liability directly to creditors, where only costs of suit can be recovered, and not any other expenses. If the passage cited be taken in its context, the meaning becomes clear:

"The purpose for which the receiver was appointed was to collect the proper *assets of the bank* and reduce them to money, so that they might be applied to the payment of its creditors. This office he performed, and *the fund so realized* may be and was properly charged with the expenses of its collection, but the receiver was not necessary to the enforcement of the liability of the stockholders in this suit. That liability was in progress of enforcement by the creditors themselves. Nothing was necessary to that end except the ordinary procedure by means of a master to ascertain what amount of debts was due, to what creditors, with the names of the stockholders who were such on the books of the bank at the date of its suspension, and the number of shares held by each. The case *differs in this respect* from that of an involuntary liquidation under the supervision of the Comptroller of the Currency. The receiver appointed by him is *the only person authorized to enforce the liability of the stock-*

holders, as well as to collect and distribute the assets of the bank; everything to be done must be done by and through him, and in his name; he is the only person charged with all the active duties and responsibilities of the liquidation of the bank, including the enforcement of the individual liability of the stockholders. The fund realized for distribution must, of course, include the costs and expenses necessarily incurred by him in the performance of these statutory duties. *The equivalent for them, in the case of creditors who upon the voluntary liquidation of the bank, seek to enforce the individual liability of the stockholders, is the ordinary costs of the court taxable in the cause.* No receiver is necessary in ordinary cases, and there is nothing in the circumstances of this case to make it an exception. Whatever costs and expenses should be paid on account of the receivership in this case, beyond any allowance made heretofore and paid, if any, *should come out of the creditors at whose instance the receiver was appointed, and not out of the stockholders.*"

The defendants here, in making their contract, entered into an obligation to creditors only, which could not be enforced by a receiver, and therefore, under the decision in the case last cited, they could not have been obliged to pay a receiver's expenses. In imposing a liability for such expenses, the statute of 1899 added a liability which did not exist before, and thereby impaired the obligation of the contract.

(2) The imposition of liability for claims other than debts contracted in the course of the corporate business (P. E., 33 & 34);

(3) the additional liability for "probable" debts to meet a "probable" deficiency (P. E., 34-37); and

(4) the additional liability for the probable expenses of collecting from other stockholders (P. E., 37),

the plaintiff's brief does not undertake to justify.

(5) The change in the nature of the liability (P. E., 37-46).

This change plaintiff's counsel seek to justify as a change of remedy, notwithstanding the radical nature of the change. The authorities cited in support of their contention all fall within one or the other of the classes described in defendants' brief (P. E., 43-46).

In *Hill vs. Merchants' Insurance Co.*, 134 U. S., 515, the only change was in the mode of proceeding. The new statute substituted for an action in equity against a stockholder for unpaid stock subscriptions, a proceeding against him by motion in the action against the corporation. The stockholder's liability was not changed, nor was he deprived of his right to be heard. The Court said, at p. 525: "The statute of 1879 *did not enlarge this liability*, for it authorized an execution against a stockholder, where there was no corporate property to be levied on, only 'to the extent of the amount of the unpaid balance of such stock by him or her owned.' While, under the original charter of the company, he was liable to a suit in equity, under the statute of 1879 he was liable to be proceeded against by notice and motion in the action in which judgment was rendered against the corporation. *In either mode he had opportunity to make defence.*"

In *Commonwealth vs. Cochituate Bank*, 3 Allen, 412, the new statute provided that the assessment proceedings might be instituted by receivers, instead of by bill holders, but the liability was in no way changed, nor was any change made in the parties entitled to be heard; the only change was in providing who should be plaintiff. This was a mere question of mode of proceeding, and did not affect any party's rights.

The Court said, at p. 45: "But upon looking at the provisions of St. 1860, c. 167, it will be found that this assessment is to be wholly under the supervision of this Court, and *upon due notice to be given to the parties*. Practically, the proceeding by assessment under this statute will in every case present all those questions which would arise in a bill in equity by a bill holder against stockholders, involving, of course, the question of the amount of assets of the bank to be applied to the payment of bills, the amount of bills outstanding, the individuals liable to be charged as stockholders, as well as the amount for which each is chargeable. As we understand this

statute, we must assume that *the sum to be assessed upon each stockholder is the same for which he would have been chargeable in the case of a bill in equity by the bill holders.*"

In *Story vs. Furman*, 25 N. Y., 214, and in *Walker vs. Crain*, 17 Barb., 119, as in the *Cochituate Bank* case, the only change made was in the person who might be plaintiff, the new statute providing that the assessment proceedings might be instituted by trustees instead of by creditors. That no other change was made clearly appears from the review of this decision, as well as of the statute of 1852, in the later case of *Cuykendall vs. Corning*, 88 N. Y., 129, 137, where the Court, discussing the effect of the statute of 1852 on corporations organized under earlier statutes, said:

"Assuming that the trustees, or the receiver, appointed in proceedings under the acts of 1852 and 1853, succeed to the rights of creditors to enforce the liability of stockholders, they can enforce no other or greater liability than that created by the act of 1848. The transfer of the right of action of the creditors to the trustees or receiver *does not enlarge or change the liability of the stockholders*, and the trustee or receiver can assess stockholders only to the extent of their liability and *can recover only upon the same allegations upon which the creditors to whose rights they succeed could have recovered.* Under the act of 1811, the only allegations necessary in an action against a stockholder were the indebtedness of the corporation, the dissolution, a deficiency in the assets to pay the debts, and the ownership by the defendant of a certain amount of stock. All the stockholders were then equally liable for the deficiency to the extent of their stock, and a uniform assessment upon all according to the act of 1852, was just."

These decisions are authorities not for, but against the validity of a change, which increases the stockholder's liability, changes the method of fixing its amount, and substitutes an *ex parte* assessment for an assessment on notice.

The contention, that the remedy may be changed at will is, it is believed, answered by the authorities cited at pages 41 to 43 of the brief for plaintiffs in error. But assuming the principle to be as stated by plaintiffs' counsel, it assumes the

existence of a definitely fixed liability, and a remedy extrinsic to it, and no part of the contract, which can be changed at will. That is not the case here. The equitable remedy recognized by the decisions as the exclusive remedy before 1899, is not merely the method of enforcing the liability, but is also *the only method of fixing the amount of the liability.*

Here is no agreement to pay a sum fixed in advance. The agreement is to pay such sum as the court of equity may fix in the proceedings contemplated by the parties; not to pay such sum as may be fixed by an *ex parte* assessment. The proceeding contemplated is a part of the contract, for unless and until the amount payable is determined in the manner agreed upon, there can be no liability to pay any sum. The case is, therefore, not at all to be compared to a case where a defendant has agreed to pay a given sum on demand or on a day certain, and objects to a change in the mode of compelling him to pay what he has agreed to pay. These stockholders have agreed to pay such sum as shall be fixed as their share by equity proceedings on notice to them; and until such proceedings are taken and the sum so paid, they are not bound to pay anything. They cannot be compelled to pay a different sum, fixed in a different way, for that was not their contract.

Howarth vs. Lombard, 175 Mass., 570, holds that the method provided for fixing the amount of the liability enters into and is a part of the contract. See extract from the opinion cited below.

A contract to pay the stockholder's share, fixed on notice to him, is quite a different thing from a contract to pay an arbitrary sum fixed without notice to him. If the two contracts were placed side by side and offered to an intending stockholder, is there doubt which he would choose? Would he regard the difference between them as immaterial, and not affecting any substantial right?

II.

The want of due process of law.

Plaintiff's counsel apparently concede that, as there has been no such notice to the defendants as to constitute due process of law, he must stand or fall upon the proposition that they were represented by the corporation in the assessment proceedings; that whether they were so represented depends on their relationship to the corporation created by their becoming stockholders; and that this relationship in turn is determined by the law of Minnesota at the time when they acquired their stock.

The decisions of the courts of Minnesota have established as the law of that State the following propositions:

1. The corporation represents the stockholders in the conduct of the corporate affairs.

2. It does not represent them as to matters which are not part of the corporate affairs.

3. The double liability is one owing from the stockholders to the creditors, and is not assets of the corporation, nor a matter regarding which the corporation can bind the stockholders.

In re People's Live Stock Insurance Co., 56 Minn., 180, 185: "Indebtedness of stockholders upon subscriptions to the stock held by them is indebtedness, not to the creditors of the corporation, but to the corporation itself. Such indebtedness is an asset of the corporation. Without a statute authorizing it, a creditor cannot reach it, except through the corporation. * * * But the constitutional or statutory liability is directly to the creditors. The corporation cannot enforce it. It is no part of its assets."

Minneapolis Baseball Co. v. *City Bank*, 66 Minn., 441, 446: "It appears from this summary of the decisions of this court that unpaid stock subscriptions, property transferred by the corporation in fraud of its creditors, and capital fraudulently withdrawn are assets in the hands of the receiver as to cred-

itors, though not as to the corporation except as to the first, and that he may recover them, because they were at one time assets of the corporation, and as to creditors they remain so; but that, as to the liability of stockholders for the corporate debts, *it is not, and never was, a corporate asset,* for it is due directly to creditors; and that the receiver cannot enforce it, in the absence of a statute authorizing him to do so. This conclusion is also supported by the authority of the text writers. Morse, Banks, § 696; Thompson, Stockh., § 342; Cook, Stock, Stockh., & Corp. Law, § 216; Morawetz, Priv. Corp., § 869."

Richardson v. *Merritt,* 74 Minn., 354, 362: "This superadded liability is not a corporate asset, and can only be enforced for the benefit of creditors, and then only to the extent of paying the corporate debts remaining unpaid after the corporate assets have been exhausted. On the other hand, the money due as the purchase price of stock is a corporate asset, which may be disposed of by the corporation while it is a going concern, the same as any other corporate asset."

Willius v. *Mann,* 91 Minn., 494, 503: "It is true that, in proceedings against a corporation, the corporation, when duly summoned and brought into court, represents the stockholders; and all stockholders, in so far as the interests and affairs of the corporation are concerned, are bound by the judgment of the court. But the stockholders are not bound by any such judgment as respects their individual interest or liability."

Hale v. *Allinson,* 188 U. S., 56, 67: "That was a contract in behalf of the creditor, with which the corporation had nothing to do."

These decisions, it is submitted, dispose of the plaintiff's contention, that the double liability is to be regarded, like that for stock subscriptions, as corporate assets, with regard to which the corporation represents the stockholders. The law in Minnesota is well settled, that the two liabilities rest upon an entirely different footing.

Opposed to these decisions is only the decision of the state court upon the very point here before the Court, in *Straw & Ellsworth Mfg. Co.* v. *Kilbourne Boot & Shoe Co.,* 80 Minn., 125, 134, 135, where the Court, after pointing out that premium notes are corporate assets collectible by a receiver, says: "There can be no difference, in principle, in respect to the

question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on the members necessary, and an action to enforce a stockholders' liability, constitutional or statutory; and it has already been said by this Court in *Hanson* v. *Davison*, 73 Minn., 454, 462, an action of the nature last mentioned, that 'in principle, there can be no difference in this respect between an action to enforce an unpaid subscription and one to enforce a stockholder's liability.' " The court appears to have overlooked the fact that both the doctrine which it there announced, and the *dictum* upon which it relied as authority, were contrary to the law of Minnesota as settled by the decisions cited above; and this fact was pointed out by this Court, with respect to the *dictum* in *Hanson* v. *Davison*, in *Hale* v. *Allinson*, 188 U. S., 56, 64, and this Court there held that the prior decisions established the law of Minnesota on this point, and could not be regarded as overruled by the later *dictum*.

That this last decision of the state court upon the very point now presented to this Court for its determination, cannot be regarded as binding on this Court, or as effective to change the rule established by the prior decisions of the courts of Minnesota and of this Court, is well settled.

Burgess v. *Seligman*, 107 U. S., 20, 33, 34: "So when contracts and transactions have been entered into, and rights have occurred thereon under a particular state of the decisions, or when there has been no decision of the State tribunals, the Federal Courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued."

Douglass v. *County of Pike*, 101 U. S., 677: "After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

Great Southern Hotel Co. v. *Jones*, 193 U. S., 532, 548: "But the decision of the state court, as to the constitutionality of the statute in question, having been rendered after

the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute here in question."

Upon the point now under discussion, this Court has already exercised its judgment in *Hale* v. *Allinson, supra,* and reached the same conclusion as the State courts; and it is now asked to reverse itself, on the federal question here presented and that, too, on the authority of a case which was decided two and one-half years before the decision in *Hale* v. *Allinson,* but which did not then lead this Court to change its view.

If the contention of these defendants is sound, that it was the settled law of Minnesota applicable to the contract, that the double liability is not a corporate asset, it is of no value to review decisions dealing with other statutes which relate to corporate assets such as stock subscriptions, or which are construed as making the double liability corporate assets, and placing them on the same footing as stock subscriptions. If under the law of Minnesota the double liability is not a corporate asset, as to which the corporation can represent the stockholder, how can it alter the case that in some other jurisdictions the liability is regarded as a corporate asset?

But apart from this, it is believed that the rule obtaining in Minnesota is the same rule that is recognized everywhere else, viz., that in the absence of some constitutional or statutory provision to the contrary, the individual liability of stockholders for debts is not an asset of the corporation, and the corporation does not represent the stockholders with respect to it. The cases cited by plaintiff's counsel are believed to fall within one or other of the classes enumerated at pages 52 to 54 of the brief for plaintiffs in error.

In citing from the opinion of the referee in *Converse* v. *Stewart* (D. E., 50, 51), the fact was apparently overlooked that his decision was reversed on appeal (105 App. Div., 478). The extract from his opinion shows that he proceeded on the assumption that the double liability was a corporate asset. In this he was doubtless misled by the statement in the opinion in *Straw & Ellsworth Mfg. Co.* v. *Kilbourne Boot & Shoe Co.,* 80 Minn., 125, 134, 135, above referred to.

Upton v. *Hansbrough*, 3 Biss., 417; *In re Republic Ins. Co.*, 3 Biss., 452; *Hawkins* v. *Glenn*, 131 U. S., 319; *Glenn* v. *Liggett*, 135 U. S., 393, and *Great Western Telegraph Co.* v. *Purdy*, 162 U. S., 329, involved assessments for stock subscriptions. The Court said, in the case last cited, at page 336: "The order of that Court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who *had not paid for their shares in full*. It was such as the directors might have made before the appointment of a receiver; and in making it the Court, having by that appointment assumed the charge of the *assets and affairs of the corporation*, took the place and exercised the office of the corporation."

Kennedy v. *Gibson*, 8 Wall., 498, 504, goes on the ground that the receiver of a national bank, as the agent of the United States, is expressly directed by the National Bank Act to enforce the individual liability of the stockholders, and that stockholders in national banks contract, with reference to this statute, to pay an assessment levied by the Comptroller of the Currency and sued upon by the receiver. *Bailey* v. *Sawyer*, 4 Dillon, 463, is to the same effect.

Hancock National Bank v. *Farnum*, 176 U. S., 640, holds only that a stockholder in a Kansas corporation who has contracted with reference to an existing statute which makes a judgment against the corporation conclusive against the stockholder, is bound by his agreement.

Howarth v. *Lombard*, 175 Mass., 570, and *Howarth* v. *Angle*, 162 N. Y., 179, dealt with a provision of the Constitution and statutes of Washington, which imposed a double liability on stockholders. The courts of Washington had, unlike the courts of Minnesota, construed the provision as creating a liability to be fixed by an assessment without notice, and to be collected by a receiver. It was held that these decisions were conclusive as to the meaning of the statute and that the stockholders who had contracted with reference to it were bound by its terms as so construed.

In *Howarth* v. *Angle*, 162 N. Y., 179, 187, the Court said: "The defendant took stock in the Tacoma bank subject to the burden of the law, *which he impliedly agreed to bear, as he could not otherwise have become a stockholder*. That burden is an asset, vested in the receiver, and can be enforced in

this State the same as a promissory note, not because the laws of Washington are in force here, but *because the defendant voluntarily assented to the conditions upon which the bank was organized.*"

The principle underlying all the cases cited by plaintiff's counsel and distinguishing them from the case at bar, is, that a stockholder *who has agreed to an assessment without notice* is bound thereby. This principle is nowhere better expressed than in the opinion in *Howarth* v. *Lombard, supra,* as illustrated by the following excerpts: "The undertaking is as if one subscribing for stock expressly agreed to take and hold it under a previously prepared contract in writing that all who should become holders of the stock should pay the amount of their subscriptions to the corporation when needed, and should pay the additional sum to create a fund for creditors, if the corporation should become insolvent, and a receiver should be appointed to collect it. * * * The question arises, how far these proceedings in the court of Washington are binding on the defendants. The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be presumed to have agreed that on the insolvency of the corporation a receiver might be appointed by the court, and the affairs of the corporation administered, and the amount of its assets and liabilities determined, and the deficiency ascertained under the order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders. This is the only proper way of accomplishing the object of the statute, and the statute, *as construed by the local courts,* means this as plainly as if every part were expressed. * * * *The undertaking of the stockholders relates directly to the payment of amounts, so to be ascertained.* * * * That such adjudications are binding upon absent stockholders in reference to assessments for unpaid subscriptions has often been expressly decided. The rule is discussed at length in *Hawkins* v. *Glenn, supra. Under the statute now before us* we can see no difference in principle between the secondary liability and the primary liability. * * * In reference to each, the subscriber for stock *contemplates the same kind of proceedings, and a collection by the same officer,* who represents not only such assets as the

corporation has for all purposes, but the right to a special fund, which is an asset that can be collected and used for creditors only. * * * The general liability under the statute in Washington is like that under the national banking act of the United States, and the court has construed the statute in such a way as to make the practical application of it substantially the same. Under that act assessments made by the Comptroller are binding upon stockholders, although made without notice to them. U. S. Rev. Sts., § 5234. Casey *v.* Gallj, 94 U. S., 673. U. S. *v.* Knox, 102 U. S., 422. Richmond *v.* Irons, 121 U. S., 27, 55. Bailey *v.* Sawyer, 4 Dillon, 463. Brown *v.* Smith, 88 Fed., 565. *The reason for holding them binding is that the obligation is contractual, and that it contemplates the possibility of such an assessment.*"

This case is authority in favor of the defendants. The same reasoning which concludes a stockholder by an assessment without notice on the ground that he has agreed to be bound by such a proceeding, must operate to hold that a stockholder who has contracted to pay an assessment made on notice to him cannot be bound by an assessment made without notice. To establish a waiver of the constitutional right to personal notice, plaintiff must show that the defendants in some way consented to an assessment without notice to them. No fact is adduced to show any such consent, nor has any authority been cited which holds that an assessment without notice was ever contemplated in Minnesota before 1899. The authority is all the other way, to the effect that no such proceeding was recognized by the law of Minnesota.

Commercial Bank vs. Azotine Manufacturing Co., 66 Minn., 413, 416: "Findings as to the amount of shares of stock held by non-resident stockholders, over whom the court had acquired no jurisdiction, or any determination as to their liability, would have been useless, for no one would have been bound by such findings."

Hale vs. Allinson, 188 U. S., 56, 80, 81: "All the non-resident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made on one of them, and as the suit was not one in which service by publication of process could be ordered, there was nothing in the nature of the suit to give

them notice or to enable the court to give judgment against them without their appearing."

In the same case, this Court, in criticizing the *dictum* above referred to in *Hanson vs. Davison, supra,* refers, at 188 U. S., p. 64, to the strong dissenting opinion by Mr. Justice Canty in that case. In that opinion occurs the following passage, at 73 Minn., pp. 463, 464:

"When the corporation is a going concern, it represents all of its stockholders in defending actions brought against it, and that is the reason why the stockholders are bound by a judgment taken against it at such a time. But, after the corporation goes into liquidation, it ceases to represent its stockholders,—at least, as to their superadded liability.

The majority admits this by admitting that all of the stockholders within the jurisdiction are *necessary parties to an action to enforce that liability.* It is the first time I have ever heard the doctrine laid down by a court that you may neglect to bring in a necessary party to the action, and yet bind him as conclusively by the result as if he had been brought in. It seems to me that this is a most extraordinary doctrine."

Plaintiff's counsel contend that the defendants as stockholders in a Minnesota corporation must be deemed to be citizens of Minnesota. If this contention were admitted, it would not help the plaintiff's case, because a State cannot deprive its own citizens of property without due process of law any more than citizens of other States; but the contention itself is based on decisions which are manifestly inapplicable to the present case. The decisions relied on are those holding that for purposes of jurisdiction, the stockholders of a corporation will be presumed to be citizens of the State of incorporation. If authority be required for the proposition that those decisions have no bearing on a question involving jurisdiction over an individual stockholder, such authority is found in the decision of this court in *Doctor* vs. *Harrington*, 196 U. S., 579, 586, 587, where the Court said, in overruling the contention that a stockholder cannot sue his corporation in the federal courts because he is deemed to be a citizen of the same State: "This is based on

the assumption adopted by this court, that stockholders of a corporation are citizens of the State which created the corporation—an assumption physically possible but hardly true in a single instance; and appellants here contend that it should be classed with the fictions of the law and subject to one of their fundamental maxims, and cannot be carried beyond the reasons which caused its adoption necessarily require. It is, however, more of a presumption than a fiction, but whether we regard it as either it cannot be pushed to the end contended for by appellees. * * * A corporation is constituted, it is true, of all its stockholders, but it has a legal existence separate from them—rights and obligations separate from them; and may have obligations to them. * * * *It is one thing to give to a corporation a status, and another thing to take from a citizen the right given him by the Constitution of the United States.*"

To the argument that an assessment without notice is a wise and proper mode of enforcing stockholders' liabilities under modern conditions, we answer, first, that it has always been regarded as elementary justice, that a party shall not be subjected to liability without an opportunity to be heard; and second, that if a State deems it wise to provide for an assessment without notice, it can require stockholders to consent to such a proceeding as a condition of acquiring stock in a corporation of the State, but as to stockholders who have not so consented, the Constitution of the United States inhibits it from assessing them without notice.

III.

The Receiver's right to sue in a foreign jurisdiction.

Plaintiff contends that the receiver has the right to sue, because the statute of 1899 "*vested the title* to these individual liabilities in the receiver, as a trustee for creditors" (D. E., 26); and this "inasmuch as the individual liabilities of the stockholders are *assets* vested in the Receiver" (D. E., 5, 6).

That the double liability is not and never was assets, and could not be collected by a receiver, has, it is believed, been abundantly shown under the preceding point.

Did the Statute of 1899 make that an asset which was not an asset before? Plaintiff claims that it did, because it authorized the receiver to sue for their collection. But this does not follow. A chancery receiver has frequently authority to sue, as custodian, or as an officer of the court, without being invested with title. The only authorities cited by plaintiff in support of his contention are *Kennedy* v. *Gibson*, 8 Wall., 506; *Richmond* v. *Irons*, 121 U. S., 27; and *Stief* v. *Hart*, 1 N. Y., 20. The first two decisions were cases under the National Bank Act, the policy of which was held to be to make the stockholders' liability actually an asset of the corporation. *Stief* v. *Hart*, *supra*, is an authority in favor of the defendants. It holds that a statute authorizing a sheriff to levy on and sell a pledgor's interest impliedly authorizes him to take it from the pledgee's possession—but obviously it does not give him title.

But if it be assumed, for the sake of the argument, that the Statute of 1899 undertook to transfer the title to this liability from the creditors to the receiver, what becomes of the plaintiff's contention that the statute was a mere change in the remedy which did not alter the rights of any party? Can so substantial a change in the relations of the parties as taking away the creditors' property and transferring it to a receiver, and making the stockholders answerable to a receiver of the corporation, instead of to the creditors with whom they contracted, be justified as a mere change in remedy?

It is submitted that the plaintiffs' argument presents the following dilemma: either the statute did not change the substantive rights of the parties, in which case the receiver has acquired no such title as is essential to give him a standing here, or else the statute did change the substantive rights of the parties by transferring the creditors' title to the receiver, and thereby impaired the obligation of the existing contract between the creditors and the stockholders.

Respectfully submitted,

LAURENCE ARNOLD TANZER,

Of Counsel for Plaintiffs in Error.